SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 177

J. M. LEDBETTER, JR., Administrator C. T. A. of the Estate of Robert L. Steele, III., and the STATE OF NORTH CAROLINA and the CLERK OF THE SUPERIOR COURT OF BLADEN COUNTY, ex rel., and for the Use and Benefit of J. M. LEDBETTER, JR., Administrator C. T. A. of the Estate of Robert L. Steele, III,

vs. *Petitioners,*

FARMERS BANK & TRUST COMPANY, a Corporation, and FEDERAL RESERVE BANK OF RICHMOND, a Corporation,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

Opinion Below.

The opinion delivered in the Court below was not officially reported and has not yet been unofficially reported.

Jurisdiction.

A final judgment was entered in the Circuit Court of Appeals for the Fourth Circuit in this case on the eleventh day of April, 1944 (R. 24). This Court has jurisdiction to

review this judgment by virtue of the provisions of Sec. 240 (a) of the Judicial Code of the United States as amended by the Act of February 13th, 1925, 43 Stat. 936 (28 U. S. C. A. Sec. 347). That section gives this Court jurisdiction to review by certiorari any case in the Circuit Court of Appeals "with the same power and authority and with like effect as if the cause had been brought * * * [here] by unrestricted writ of error or appeal."

Statement of the Case.

The case is fully stated in the Petition (pp. 1-4).

ARGUMENT.

I.

The question of which Rule of Civil Procedure applies when there is a motion to amend a complaint after the action has been dismissed for failure to state a claim on which relief can be granted is an important question of Federal Procedure which has not been decided by this Court.

The importance of this question is indicated by the fact that there is confusion in the lower federal courts as to which rule applies. In *Safeway Stores* v. *Coe*, 78 U. S. App. D. C. —, 136 F. 2d 771, 57 U. S. P. Q. 516, the question arose in the Court of Appeals for the District of Columbia as to whether or not Rule 59 (b) applied on a motion to vacate a judgment. The Court held that Rule 59 (b) does apply, but one judge dissented. The same question arose in the Circuit Court of Appeals for the First Circuit in *Jusino* v. *Morales & Tio*, 139 F. 2d 946. The Court held that Rule 59 (b) applied, but the Court remarked (p. 948): "On a literal reading, it is not easy to bring such a motion within the rule." And later the court remarked: "Though the matter is not free from doubt, we feel constrained to follow the rulings in the

cases above cited * * *." The same Court had earlier stated that a motion to amend after an action had been dismissed for failure to state a claim on which relief can be granted is a motion under Rule 60 (b). *United States v. Newberry Manufacturing Company*, 123 F. 2d 453. And in the instant case, the Circuit Court of Appeals for the Fourth Circuit was presented with the question of whether or not Rule 59 (b) applied. The question was also raised in *Nachod & United States Signal Company, Inc. v. Automatic Signal Corp.*, 26 F. Supp. 418.

The fact that the Circuit Court of Appeals for the First Circuit stated that the matter is not free from doubt and applied one rule in a case involving a motion to vacate a judgment and another rule in a case involving a motion to amend a complaint after the action had been dismissed for failure to state a claim on which relief can be granted (which must necessarily have resulted in the vacation of the original judgment if the motion to amend had been allowed) and the fact that the Court of Appeals for the District of Columbia was divided as to which rule should apply shows that there is confusion in the lower federal courts as to which rule does apply. This matter has not been decided by this Court.

II.

The question of the reviewability of the rulings of the district judge on a motion which is ordinarily within his discretion but which he decided as a matter of law is an important question of federal procedure in which there is conflict between the decisions of the Circuit Court of Appeals for the Fourth Circuit and the Circuit Court of Appeals for the Sixth Circuit.

In the instant case, the Circuit Court of Appeals for the Fourth Circuit held (R. 19) that the ruling of the dis-

trict judge was made as a matter of discretion though the order shows (R. 13) that the ruling was made as a matter of law. Thus the Circuit Court of Appeals apparently conclusively presumed that the order was made in the exercise of the district judge's discretion.

In *Felton* v. *Spiro*, 78 F. 576, 24 C. C. A. 321, *Herman* v. *American Bridge Company*, 167 F. 930, and *City of Covington* v. *Cincinnati N. & C. Ry. Co.*, 71 F. 2d 117, the Circuit Court of Appeals for the Sixth Circuit held that where a district judge denied a motion which was within his discretion because he deemed he had no power to grant the motion, or where he failed to exercise his discretion, the decision was reviewable. This is an important question of federal procedure and should be settled by this Court for the guidance of the lower federal courts. The decisions of the Circuit Court of Appeals for the Sixth Circuit are sustained, to some degree at least, by the decision of this Court in *Mattox* v. *United States*, 146 U. S. 140, 36 L. Ed. 917, 13 S. Ct. 50. In so far as the decisions of the Circuit Court of Appeals for the Sixth Circuit above cited are sustained by the decision of this Court in *Mattox* v. *United States, supra*, the decision of the Circuit Court of Appeals for the Fourth Circuit in this case is contrary to that decision of this Court.

III.

The Circuit Court of Appeals failed to follow the applicable decisions of North Carolina.

1. Since the Supreme Court of North Carolina follows the weight of authority,[3] and the weight of authority is

[3] *In re Steele* (1942), 220 N. C. 685, 18 S. E. 2d 132; *Gorrell* v. *Greensboro Water Supply Co.*, 124 N. C. 238, 32 S. E. 720, 46 L. R. A. 513, 70 Am. St. Rep. 598; *Mial* v. *Ellington*, 134 N. C. 131, 46 S. E. 961, 65 L. R. A. 697, overruling *Hoke* v. *Henderson*, 15 N. C. 1, 25 Am. Dec. 677 and other North Carolina cases following it in order to follow the weight of authority. *Mial* v. *Ellington, supra*, was followed in *Brown* v. *Commissioners of Richmond* (1943), 223 N. C. 744, 28 S. E. 2d. 104.

to the effect that the one who controls a third person is liable for his torts regardless of whose servant the third person is,[4] if the Circuit Court of Appeals had followed the weight of authority in this case (and hence followed the North Carolina decisions following the weight of authority), it would have held that the mortgagees are liable to the mortgagor because they controlled the receiver.

Furthermore, in *Shapiro, Administrator,* v. *Winston Salem* (1938), 212 N. C. 751, 194 S. E. 479, the Supreme Court of North Carolina held that where the W. P. A. borrowed a servant from the City of Winston Salem and controlled him, the City of Winston Salem was not liable for the torts of the servant though the city continued to pay him and had the right to discharge him. This is in accordance with the cases cited to sustain the proposition that the weight of authority is to the effect that the person who controls the third person is liable for his torts.

And finally, the Supreme Court of North Carolina held in *Dillon, Administratrix,* v. *Winston Salem,* 221 N. C. 512, 20 S. E. 2d 845, that he who controls a third person is liable for his torts irrespective of whether or not the relationship of master and servant exists. In that case, plaintiff was held guilty of contributory negligence where he was directing the driver where to drive and the driver was negligent.

2. As was stated in the petition, of the six cases outside of North Carolina which have holdings on the liability of the mortgagor and mortgagee for the loss of property in the hands of the receiver, only two of them (*Kaiser* v. *Keller* and *Robinson* v. *Arkansas Loan & Trust Company*)

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[4] *Hartell* v. *T. H. Simpson & Son Company,* 218 N. Y. 345, 113 N. E. 255; *Denton* v. *Yazoo & M. R. Co.* (1932), 284 U. S. 305, 76 L. ed. 310, 52 S. Ct. 141; *Linstead* v. *Chesapeake & Ohio Ry. Co.* 276 U. S. 28, 48 St. Ct. 241, 72 L. ed. 453; *McInerny* v. *Delaware & H. Canal Co.* (1897), 151 N. Y. 411, 45 N. E. . . . . ; *Indiana Union Traction Co.* v. *Benadum* (1908), 42 Ind. App. 121, 83 N. E. 261.

hold that the mortgagor may not recover from the mortgagee for the loss of property in the hands of the receiver. As was stated in the petition, both of those cases are distinguishable from the instant case. *Kaiser* v. *Keller* was a case where a receiver was appointed and gave bond and the property was destroyed; then the mortgagor counterclaimed against the mortgagee for the loss of the property. The Court said: "Nor is it shown that plaintiff exercised any control over the property, or had anything to do with its management or disposition. * * *" In this case it is alleged that the receiver was under the control of the mortgagees. Furthermore, in *Kaiser* v. *Keller* it was not shown that the bond was inadequate or that the receiver was insolvent as was alleged in this case. Quite naturally the Court remarked: "His remedy is against the receiver and his bondsmen."

Likewise, in the case of *Robinson* v. *Arkansas Loan & Trust Company* there was no showing that the receiver was insolvent or the bond inadequate. Furthermore, of the six authorities relied upon by the Court in the Robinson Case, only one of them, High on Receivers, was in point, and Mr. High relied solely on the case of *Kaiser* v. *Keller*, *supra*.

The opinion in *Sorchan* v. *Mayo*, *supra*, is a well reasoned one by an able chancellor (Vice-Chancellor Pitney). The Vice-Chancellor said:

"* * * But I do not find it necessary to decide the question whether, where an indifferent person is appointed by the court upon the application of a mortgagee and becomes a defaulter, and his sureties are insufficient, the resulting loss should fall upon the mortgagee, and have referred to the authorities only for the purpose of showing that they are not all in accord with the general proposition laid down by the textwriters. It is also worthy of remark that the case of a mortgagee who applies for a receiver

stands on a footing decidedly different from that of a creditor who is suing for himself and other creditors. The mortgagee asks for the rents and profits to be applied to his mortgage, on the ground that he holds the legal title to the premises and is entitled of right to the possession and to receive the rents; and if he himself were in possession he would be entitled to hold it, and receive the rents himself, until his debts were paid; and it seems to me that it would be no hardship upon him if the rule were established that he should take the risk of the solvency of the receiver, and that a receiver so appointed should be considered the agent of the mortgagee. Such a rule would make the complainants and their solicitors applying for such appointments careful as to the character of the men whom they nominate to the court, and the responsibilities of the sureties given by the appointee * * *"

The above quotation from Vice-Chancellor Pitney is especially apt when it is considered that, as Chief Justice Clark remarked in *Gorrell* v. *Greensboro Water Supply Co.*, *supra* authorities "are to be weighed, not counted."

3. As we pointed out in the petition (p. 6) and above in this brief (p. 13), the weight of authority is to the effect that where a third person actively interferes with the manner in which a servant of another is operating his master's business, and a person is injured as a result of the interference, the third person is liable for injury resulting therefrom to the person injured. This is in accord with the decision of the Supreme Court of North Carolina in the case of *Dillon* v. *Winston-Salem*, 221 N. C. 512, 20 S. E. 2d 845. In that case it was held (221 N. C. 520) that the person under whose control the driver was operating the automobile will be deemed the master from the point of view of liability irrespective of whether or not the relationship of master and servant exists. And the person who did the

directing of the driver was held guilty of contributory negligence even though he did not direct any of the negligent acts. The amendment offered by petitioners was much stronger than the factual situation in the *Dillon Case*, for it was alleged (R. 11-12) that the mortgagees instructed the receiver not to take insurance and that as a result of those instructions, the receiver *failed* to take insurance. Thus the mortgagees participated in the wrongful act.

If the Circuit Court of Appeals had followed the weight of authority or the *Dillon Case*, it would have held that the amendment which petitioners sought to add to their complaint stated a cause of the action, for it alleged therein that the plaintiffs suffered a loss as a result of the receiver's failure to take insurance and that his failure to take insurance was the proximate result of the instructions of the mortgagees (R. 11-12).

4. The Supreme Court of North Carolina looks at the reality of the situation rather than at the form. Thus it will look through the corporate identity;[5] it will allow a mortgagor to prove that a purchase at a foreclosure sale by a third person was in reality a purchase for the mortgagee;[6] and it will construe a paper writing which is in form a deed of trust to be in reality a mortgage.[7] Hence, it would seem, had the Circuit Court of Appeals followed applicable local decisions, it would have held that the petitioners' complaint states a claim on which relief can be

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[5] *Unemployment Compensation Commission* v. *Coal Co.* (1939), 216 N. C. 6, 3 S. E. 2d 290; *Mills* v. *Mutual Building & Loan Association* (1940), 216 N. C. 664, 6 S. E. 2d 549; *Sineath* v. *Katzis* (1941), 218 N. C. 740, 756, 12 S. E. 2d. 671.

[6] *Austin* v. *Stewart* (1900), 126 N. C. 525, 36 S. E. 37; *Smith* v. *Greensboro Joint Stock Land Bank* (1938), 213 N. C. 343, 196 S. E. 481; *Council* v. *Greensboro Joint Stock Land Bank* (1938) 213 N. C. 329, 196, S. E. 483; *Mills* v. *Mutual Building & Loan Association* (1940), *supra*; *Peedin* v. *Oliver* (1943), 222 N. C. 665 24 S. E. 2d 519.

[7] *Mills* v. *Mutual Building & Loan Association, supra.*

granted and would have allowed petitioners to prove that the receiver was in reality the agent of the mortgagees.

5. The Circuit Court of Appeals failed to follow a decision of the Supreme Court of North Carolina in *Vanstory* v. *Thornton*, 112 N. C. 196, 17 S. E. 566, 34 Am. St. Rep. 483. In that case the Court said:

"And his honor correctly decided that the facts put in evidence did not prove that any payment had been made on the judgment, or that it had been satisfied in whole or in part. There was no offer to prove that plaintiff had actually received from the receiver in *Thornton* v. *Lambeth*, 103 N. C. 86, any money to be applied on this judgment, or that his failure to get it was due to his own fault or negligence. That receiver was appointed *at the instance of the defendant* to take charge of the partnership assets (*Thornton* v. *Lambeth*, 103 N. C. 86), and if, without any neglect on his part, the plaintiff failed to get what the judgment of the court in that cause directed the receiver to pay him, the loss must fall on the defendant (the plaintiff there), whose duty it was to see that the money he owed was in fact paid." (Emphasis supplied.)

Respectfully submitted:

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